SUPREME COURT, U.S.
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No. 92-1261

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GARY ANTOINE, ET AL.,
Petitioners,

vs.

CALIFORNIA COASTAL COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SIX

RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS BELOW

The decision of the California Court of Appeal, Pet. App. A, is not reported.

JURISDICTION

1. No jurisdiction exists under 28 U.S.C. § 1257 regarding any of the questions presented because there is no final judgment below. The California Court of Appeal reversed the trial court judgment with instructions to remand to the California Coastal Commission for further proceedings. Pet., p. 15; Pet. App. A, pp. 2, 15-16, 24. Before the Coastal Commission, petitioners will have the opportunity to present further evidence in

support of their contention that the seawall rests entirely on private property. *Ibid.*

2. Petitioners have not complied with Rule 14.1(h). That rule requires, where review of a state court judgment is sought, that the petition set forth facts showing that the federal questions were timely and properly raised in the state courts. Questions 2, 3, and 4 were not timely and properly raised in the state courts. Accordingly, no jurisdiction exists to consider these questions.

3. Questions 4 and 5 are solely questions of state law, and present no federal question for decision by this Court.

ADDITIONAL STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article X, section 4 of the California Constitution, which provides:

> "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

2. Section 670 of the California Civil Code, which provides:

> "The State is the owner of all land below tide water, and below ordinary high-water mark, bordering upon tide water within the State . . . ."

3. The following sections from the California Coastal

Act, which provide in pertinent part as follows:

California Public Resources Code section 30210:

"In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of property owners, and natural resource areas from overuse."

California Public Resources Code section 30211:

"Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation."

California Public Resources Code section 30212:

"(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where [exceptions listed]. . . .

"(b) For purposes of this section, 'new development' does not include:

". . . . . .

"(4) The reconstruction or repair of any seawall; provided, however, that the reconstructed or repaired seawall is not seaward of the location of the former structure.

". . . . . .

"(c) Nothing in this division shall restrict public access nor shall it excuse the performance of duties and responsibilities of public agencies which are required by Sections 66478.1 to 66478.14, inclusive, of the Government Code and by Section 4 of Article X of the California Constitution."

REASONS WHY THE WRIT SHOULD BE DENIED

I. ON VARIOUS GROUNDS, NO JURISDICTION EXISTS UNDER 28 U.S.C. § 1257

A. There Is No Final Judgment

There must be a "final judgment" before there can be review on certiorari under 28 U.S.C. § 1257. To be reviewable, a state court judgment

> "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co.* v. *Railroad Commission*, 324 U.S. 548, 551 (1945).

There is a lack of finality where a state court remands to an administrative agency for further proceedings. *Laclede Gas Co.* v. *Public Service Commission*, 304 U.S. 398 (1938); *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 69-72 (1948).

In *Laclede*, *supra*, this Court was asked to review a judgment of the Supreme Court of Missouri that had affirmed a lower court decision, but also ordered the lower court to remand to the Missouri Public Service Commission for reexamination of certain questions of fact regarding valuation of property for ratemaking purposes. On its motion to dismiss the appeal, the Public Service Commission argued that new evidence on remand could result in a different finding of "fair value," as well as new findings concerning various allowances for depreciation and amortization of costs, thus presenting the basis for another appeal. This Court agreed that the state court had not finally disposed of the controversy, and dismissed the appeal.

A like situation exists here. Apparently on the basis that the homeowners and the Sandyland Cove Homeowners Association (hereafter jointly referred to as "Sandyland") may not have appreciated that they had the burden to establish that their project rested entirely on their own property, the Court of Appeal thought it "only fair to give Sandyland the opportunity to present further evidence to the Commission." Pet. App. A, pp. 15-16. Accordingly, the Court of Appeal reversed the trial court judgment with instructions to remand to the Commission for further proceedings. Pet. App. A, pp. 2, 24. The Court commented that, on remand, "Sandyland may be able to show the seawall lies entirely on private land . . . ." Pet. App. A, p. 24.

Presented with new evidence, the Commission may determine that the seawall rests entirely on Sandyland's property. But even should the Commission decide, in light of new evidence, that the seawall intrudes onto tidelands, the nature and extent of the new evidence and the content of the Commission' new decision might well present new issues for review or alter those that Sandyland offers for review at this time. In these circumstances, there is no final judgment. See also *Minnick* v. *California Dept. of Corrections*, 452 U.S. 105, 120-127 (1981); *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U.S. 251, 255-257 (1917) (state supreme court decision on constitutionality of condemnation by private company not final judgment because damages yet to be ascertained in trial court); *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621, 633-634 (1981); cf. *Darr* v. *Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting) (even where jurisdiction exists, prudential considerations may make it desirable to "wait and see"). None of the special circumstances are present here that occasionally prompt departure from the rule that interlocutory judgments are not final judgments. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477-485

(1975). To paraphrase Chief Justice Rehnquist's statement in joining the Court's opinion dismissing the appeal in *San Diego Gas & Electric, supra,* the Court "would [be] much better able to formulate federal constitutional principles . . . if [it] knew what disposition the California courts finally made of this case." 450 U.S. at p. 636.

B. Questions 2, 3, and 4 Were Not Timely and Properly Raised Below

This Court lacks jurisdiction to consider a federal question under 28 U.S.C. § 1257 unless that question was raised and decided below. *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969). In considering whether a federal question was timely raised in a state court, state rules concerning the timeliness of issue presentation are determinative; and if state rules prohibit consideration of an issue because it was not timely raised, this Court may not consider the issue. See *Beck* v. *Washington*, 369 U.S. 541, 550-553 (1962); *Stembridge* v. *Georgia*, 343 U.S. 541, 547 (1952) (no jurisdiction where question was not timely raised under state practice because broached for the first time in a petition for rehearing in the intermediate state appellate court).

Question 2, pertaining to petitioners' assertion that the Court of Appeal "took" their property by allegedly "redefining the boundary" between private property and public tidelands, was raised for the first time in the petition for certiorari. It could and should have been raised before the Commission itself, see *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952), and certainly should have been raised in the trial court, since that court would necessarily have been called upon, in petitioners' words, to "sanction the Coastal Commission's physical invasion of private property" by accepting the Commission's interpretation of California tidal boundary

law. Pet., p. i. Accordingly, there is no jurisdiction to consider this question.

The same is true of Question 3, pertaining to petitioners' argument that, regarding those homeowners whose respective segments of the seawall may not rest on state tidelands, there was no sufficient nexus to allow imposition of the access conditions as against them. This question, too, was raised for the first time in the petition for certiorari; neither the Commission nor any of the three state courts below have had an opportunity to consider it.

Question 4 concerns allocation of the "burden of proof" regarding the propriety of access easements required as conditions of land use permit approvals. This issue is distinct from the issue of the burden of proof regarding essential facts that establish entitlement to issuance of a land use permit. This latter question was timely put in issue. This new issue, however, relates not to proof of factual matters, but instead to the legal question of what are permissible conditions once the facts have been established. It was raised for the first time on petition for rehearing following the decision of the Court of Appeal. See Pet. for Rehearing, pp. 7-8. As such, it was not timely raised. *People ex. rel. Dept. of Public Works* v. *Mascotti*, 206 Cal.App.2d 772, 779-780, 23 Cal.Rptr. 846 (1962) ("It is the settled rule of this court that points made for the first time on petition for rehearing will not be considered."). Neither will the state supreme court on petition for review consider a question that was raised for the first time in a petition for rehearing in the court of appeal. *Flores* v. *Stone*, 21 Cal.App. 105, 111, 131 P. 348 (1913) (statement by state supreme court on denial of petition for hearing after decision by the court of appeal).

C. Questions 4 and 5 Involve Matters That Are Solely Questions of State Law

Question 4 does not really concern the burden of proof, but rather whether, given the facts that have been established, sufficient nexus as a matter of law has been established between the adverse impacts of a project and conditions purportedly responsive to those impacts. But accepting petitioners' characterization that the question pertains to the "burden of proof," the allocation of the burden of proof in state land use proceedings is a matter of state law. Under California law, the burden of proof in a land use permit proceeding is upon the applicant. *Smith* v. *County of Los Angeles*, 211 Cal.App.3d 188, 203, 259 Cal.Rptr. 231 (1989); see *Reed* v. *California Coastal Zone Conservation Com.*, 55 Cal.App.3d 889, 895, 127 Cal.Rptr. 786 (1975); Cal. Pub. Resources Code, § 30601.5 (requiring permit applicants to demonstrate a legal right to use the property for their proposed development). No federal question is presented.

Nor does Question 5 involve a federal question. Here, petitioners argue that, as a matter of federal constitutional law, state courts must unilaterally strike invalid permit conditions and order issuance of permits as judicially modified, without remanding to the land use agency for reconsideration of its decision in light of the court's decision. The degree of deference that courts must afford administrative adjudications is peculiarly for the courts and the legislature of a State to determine. In California, courts assure that administrative agencies act within the range of reasonable discretion, but they are not allowed to substitute their own discretion for that of the agency whose decision is under review. California Code of Civil Procedure section 1094.5, subdivision (f), provides that a court, in setting aside an administrative decision, "may order [the agency] to take such further action as is specially enjoined upon it by law but

the judgment shall not limit or control in any way the discretion legally vested in the [agency]." California courts have confirmed that a writ of mandamus cannot compel the performance of an act by an agency in any particular manner, and that a court may not substitute its discretion for that of the administrative agency. See, e.g., *Bank of America* v. *State Water Resources Control Bd.*, 42 Cal.App.3d 198, 214-215, 116 Cal.Rptr. 770 (1974); *Bowles* v. *Antonetti*, 241 Cal.App.2d 283, 286-287, 50 Cal.Rptr. 370 (1966); compare *F.P.C.* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration. . . .").

II. CERTAIN OF PETITIONERS' CONTENTIONS ARE PREMISED ON THE UNTENABLE ASSERTION THAT "THE ONLY CREDIBLE EVIDENCE" ESTABLISHED THAT THE SEAWALL WAS BUILT ENTIRELY ON PRIVATE PROPERTY

Certain of petitioners' arguments are premised on their assertion that "the only credible evidence before the Commission at the time of hearing established that the seawall was not located on state tidelands and therefore does not block lateral beach access." Pet., p. 29; and see Pet., pp. i, 20. The record is otherwise.

The new seawall project was not merely an "improvement" of the existing seawall. It was a new structure. It consisted of some 9,300 quarry rocks, four to six feet in diameter, and weighing four to six tons apiece. Pet. App. E, pp. 6-7. 37,400 tons of rock were to be placed along the full 2,550 length of the beach. *Ibid.* Whereas the old seawall was 18 feet wide at the base and rose 10 feet above mean sea level, the new seawall was 50 feet wide at the base and rose 16 feet

above mean sea level. Pet. App. E, p. 7. The new wall extended 12 to 16 feet farther seaward than the old one. Pet. App. A, pp. 2, 4, 5, 14-15; Pet. App. E, pp. 6, 9.

There was various testimonial and documentary evidence before the Commission concerning the new seawall's location in relation to the mean high tide line and the effect of the wall on preexisting public access along the beach. Portions of the toe of the old seawall were in the surf zone, and the new wall was 12 to 16 feet farther seaward. Pet. App. A, pp. 2, 4, 5, 14-15. One witness testified that the wall blocked beach access to the slough mouth at Sandyland Point that had been available prior to the wall's construction. Joint Appendix (J.A.) in the Court of Appeal, p. 837. Another witness testified that at high tide the water came up as much as three feet on the rocks of the revetment. J.A. 833. Coastal staff members had observed the revetment awash a full three hours before the time of high tide, and testified that lateral movement along the beach was impossible at that time. Pet. App. E, pp. 9-10. Numerous photographs showed the revetment awash, and there was testimony that these photos accurately reflected conditions during the late fall, winter, and spring. Pet. App. A, p. 3. There was testimony from beach users that, even during the summer months, when the beach is wider, the new seawall blocked access along the western one-third of the beach under most tidal conditions. Pet. App. E, p. 10. Sandyland's own plans showed pre-construction topography in relation to the toe of the new wall, and demonstrated that the wall intruded seaward of the mean high tide line by as much as 14 feet as of the date of the survey. See J.A., pp. 34, 36-38, 105, 830, 1891; Apps. I, J, Appendices to Brief of *Amicus Curiae*, State Lands Commission. The plans for the new wall showed the toe of the new structure lying at elevations

between −1.59 feet and +3.5 feet above mean sea level. Pet. App. E, p. 11. Mean sea level is below the plane of mean high tide. See J.A. 34, 105, 1891; 2 Shalowitz, Shore and Sea Boundaries (1964), pp. 62-66. The intersection of the plane of mean high tide with the shore defines the mean high tide line. See 1 Shalowitz, Shore and Sea Boundaries (1962), pp. 89-97. The plans also showed a plotting of a mean high tide line survey performed 20 years earlier by the State Lands Commission, which showed the mean high tide line some 60 to 90 feet waterward of its location as reflected in the topographic contours shown on Sandyland's plans for the project, dated February 1983. Pet. App. A, p. 4. The Bailard/Jenkins Report, prepared in April 1982 for the City of Carpenteria, established that long-term beach erosion in this area had taken place primarily during two periods, one of which was between 1961 and 1973, with most of the erosion taking place after 1964. J.A. 303-306.

From the foregoing review of the evidence, it is evident that petitioners may not legitimately premise their arguments upon the assertion that "the only credible evidence" established that the seawall was not built on state tidelands.

III. THE PETITION DOES NOT PRESENT ANY ISSUES MERITING REVIEW BY THIS COURT

A. Adherence to the Nexus Requirement of *Nollan* v. *California Coastal Commission* Does Not Require Abandonment of the Standards of Evidentiary Review That Are Commonly Applied to Administrative Decisions Under State Law

Sandyland interprets the Court of Appeal's application of the substantial evidence rule as a decision not to insist on a "substantial relationship" between the impacts of the new seawall and the access conditions

imposed by the Commission. Use of the substantial evidence rule, it argues, conflicts with the strict nexus requirements of *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987).

The "closeness of fit" between a project's impacts and the conditions imposed in purported response to those impacts is a question independent of the standard of evidentiary review that is applied by a reviewing court in assessing whether there is evidentiary support for the factual findings that establish whether the strict nexus requirement has been met. Here, there was evidence that the new seawall intruded onto state tidelands, thereby depriving the public of one of its principal benefits in property that is held in trust for its use: public access along the shore. The Commission responded with conditions that provided replacement lateral access. One can imagine no closer a connection between a burden caused by a project and conditions designed by the regulating agency to alleviate that burden.

Application of the substantial evidence test in no way vitiated or avoided the requirement of a "substantial relationship" between the burden and the offsetting condition. The substantial evidence test is routinely applied in land use application cases. See *Barrie* v. *California Coastal Commission*, 196 Cal.App.3d 8, 14-16, 241 Cal.Rptr. 477 (1987); *Whaler's Village Club* v. *California Coastal Commission*, 173 Cal.App.3d 240, 251, 218 Cal.Rptr. 122, cert. den. and appeal dism., 476 U.S. 1111 (1985); *Paoli* v. *California Coastal Commission*, 178 Cal.App.3d 544, 550-551, 223 Cal.Rptr. 792 (1986); *Surfside Colony, Ltd.* v. *California Coastal Commission*, 226 Cal.App.3d 1260, 1269, 277 Cal.Rptr. 371 (1991). The test requires the court to assess whether there is "substantial evidence in the light of the whole record," and to consider all relevant evidence, contradicted and uncontradicted. Cal. Code Civ. Proc., § 1094.5,

subd. (c); e.g., *LeVesque* v. *Workmen's Comp. App. Bd.*, 1 Cal.3d 627, 635-640, 83 Cal.Rptr. 208 (1979); *Apte* v. *Regents of the University of California*, 198 Cal.App.3d 1084, 1091, 244 Cal.Rptr. 312 (1988).

Contrary to petitioners' interpretation, there is nothing in this Court's opinion in *Nollan* that suggests that the Court was there taking upon itself the burden of conducting a *de novo* review of the evidence in local land use cases, thereby displacing application of well-established standards of evidentiary review regarding the factual findings of administrative agencies. Specifically, contrary to petitioners' representation, there was no review and rejection by the Court of the evidence concerning the location of the mean high tide line or the finding based on that evidence. The Commission did not there assert that the house was built on tidelands or offer that as a justification for the lateral access easement there at issue. Rather, the proximity of the fluctuating mean high tide line to the house, and the potential that increased private use of the beach by the residents would promote boundary disputes with members of the public, was offered as an alternative reason for the easement. In a brief discussion in footnote 6 of the opinion, only this proffered nexus was rejected; the Court did not engage in any analysis of the evidence.

B. In Ruling on an Issue of Tidal Boundaries That Has Not Been Definitively Settled by the California Supreme Court, the Court of Appeal Did Not "Take" Sandyland's Property

Petitioners argue that the Court of Appeal, in determining that the state-private boundary along a sandy ocean beach fluctuates with seasonal changes in the location of the mean high tide line, "redefined" the boundary between private property and public tidelands under California law. They argue that the court's

decision was a "sudden change in state law, unpredictable in terms of relevant precedents," and therefore "took" their property without just compensation in violation of the Takings Clause and the Fourteenth Amendment.

This Court has repeatedly rejected the notion that judicial declarations of property rights can constitute "takings." *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444, 450 (1924); *Central Land Co.* v. *Laidley*, 159 U.S. 103, 112 (1895); see *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 680, 681, n. 8 (1930); *Great Northern Ry.* v. *Sunburst Co.*, 287 U.S. 365 (1932); but cf. *Muhlker* v. *New York & Harlem Railroad Co.*, 197 U.S. 544 (1905); *Demorest* v. *City Bank Co.*, 321 U.S. 36 (1944); *Fox River Paper Co.* v. *Railroad Commission*, 274 U.S. 271 (1927).

In any case, there is no application for such a theory here. The issue of the proper location of the state-private boundary along a sandy ocean beach where the mean high tide line fluctuates with the seasons has not been definitively ruled upon by the California Supreme Court. Nonetheless, the weight of precedent and the more persuasive arguments support the conclusion reached by the Court of Appeal in this case.

Under California law, "[t]he State is the owner of all land below tide water, and below the ordinary high-water mark, bordering upon tide water within the State . . . ." Cal. Civ. Code, § 670. It has long been the law in California that the tidal boundary between tidelands and private upland property is "a shifting boundary, going landward with erosion and waterward with accretion." *City of Oakland* v. *Buteau*, 180 Cal. 83, 87, 179 P. 170 (1919); accord, *Strand Improvement Co.* v. *Long Beach*, 173 Cal. 765, 772-773, 161 P. 975 (1916). Similarly, it is well-established that this tidal boundary is located at the mean high tide line, which is defined by the intersection with the profile of the shore of a plane

corresponding to the mean elevation of all high tides over a tidal epoch of 18.6 years. *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 26-27 (1935); *City of Long Beach* v. *Mansell*, 3 Cal.3d 462, 478, n. 13, 91 Cal.Rptr. 23 (1970); *City of Berkeley* v. *Superior Court*, 26 Cal.3d 515, 519, n. 1, 162 Cal.Rptr. 327 (1980); but see *People* v. *Wm. Kent Estate Co.*, 242 Cal.App.2d 156, 161, 51 Cal.Rptr. 215 (1964) (concluding that only the high neap tides—those that occur twice a month as a result of the Moon, Earth and Sun forming a right angle—are to be averaged in calculating the plane of mean high tide). It has also long been recognized that the mean high tide line on a sandy beach shifts. See *Muchenberger* v. *City of Santa Monica*, 206 Cal. 635, 639, 642, 275 P. 803 (1929); *Swarzwald* v. *Cooley*, 39 Cal.App.2d 306, 313, 103 P.2d 580 (1940); *City of Los Angeles* v. *Borax Consolidated*, 102 F.2d 52, 56-57 (9th Cir. 1939).

However, it still has not been conclusively resolved in California how the general principles of littoral boundary change by erosion and accretion apply in the context of a sandy beach, where alternating seasonal erosion and accretion of beach sand caused by wave action result in shifting locations for the mean high tide line. The reported case closest in point, and the one which petitioners interpret as contrary to the Court of Appeal decision in this case, is another court of appeal decision, *People* v. *Wm. Kent Estate Co., supra*. But contrary to what petitioners argue, *Kent* did not definitively resolve the issue of how the tidal boundary is to be located on a sandy beach. The court there was clearly uncomfortable with a boundary line that wasn't fixed, probably because it was being asked to enjoin maintenance of a fence that was allegedly built on tidelands, and a shifting boundary could present obvious difficulties with enforcement. See 242 Cal.App.2d 156, 161 (If the line could not be fixed with reasonable certainty on retrial, "the trial court should consider whether the uncertainty

is so great as to warrant denial of injunctive relief . . . ."). But the *Kent* court merely suggested that it might be possible to fix some type of average line, *if* it could be established on retrial that the annual summer-to-winter changes in the position of the mean high tide line were "constant, in offsetting pairs occurring annually." *Id.*, at p. 160. *If* the changes were substantially the same distance each year, the court speculated, that might "[afford] a basis for fixing an average, mean, or ordinary line of the shore against which the average plane of the water at high tide may be placed to determine a reasonably definite boundary line." *Id.*, at pp. 160-161. Upon retrial, it developed that no such neatly predictable average occurred in nature; the changes were not uniform from year to year. See App. C, Appendices to Brief of *Amicus Curiae*, State Lands Commission: Graber & Thompson, *The Issues and Problems of Defining Property Boundaries on Tidal Waters in California*, p. 23, and see *id.*, App. A, p. 30. It is therefore simply not the case, contrary to petitioners' representations, that *Kent* established that the state-private tidal boundary along a sandy beach is a fixed line based on an "average" profile of the beach.

It was this body of precedent that the Court of Appeal had before it when the issue of tidal boundary location on sandy beaches came before it in this case. The Court concluded that the boundary between state and private ownership along sandy ocean beaches was the mean high tide line; that the mean high tide line moved with changes in the profile of the shore; and that the boundary moved with it. It rejected Sandyland's argument that the boundary had to be fixed at some "average" location of the mean high tide line, as well as the State's contention that the boundary should be fixed at the location of the mean high tide line when the beach is in its most landward or "winter" profile:

> "Neither solution is satisfactory. Each results in a boundary that differs from the true mean high tide line most of the time. Adopting either rule shifts boundary lines in such a way that public and private landowners may be deprived of valuable rights at various times of the year. We question whether we have the authority to affect such rights by judicial fiat even if we were inclined to do so." Pet. App. A, pp. 18-19.

The court instead accepted the State's alternate argument, the one that is most consistent with the previously cited California Supreme Court precedent that tidal boundaries fluctuate with erosion and accretion. That is, the littoral boundary along a sandy beach fluctuates as the mean high tide line fluctuates.

The court specifically rejected Sandyland's argument on four grounds: (1) even if it were practically possible to ascertain an "average" shore profile and so fix an "average" mean high tide line, such a boundary would differ from the true mean high tide line most of the time; (2) such a fixed line would deprive both private landowners and the public of valuable property rights at various times of the year; (3) under the solution speculated upon hopefully in *Kent*, it would be possible to fix the line only in the very limited hypothetical situation where the sand movement was substantially identical each year because substantial variation would mean a constantly changing "average" location for the line; (4) a fixed average position would be unworkable in the situation of a beach undergoing long-term erosion because, unless the "average" line was constantly relocated landward, the fixed line would result in private ownership of land that is permanently under ocean waters. Pet. App. A, pp. 19-20.

The Court of Appeal's decision on this point was well-reasoned and well within the bounds of available

California precedent. Contrary to petitioners' contention, Pet., pp. i-ii, there was no "sudden change in state law, unpredictable in terms of relevant precedents."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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